No. 87-1475

In The

Supreme Court of the United States

October Term, 1987

ANCHOR ESTATES, INC. and DAKOTAVILLE, INC.,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WILLIAM R. MILLS
Attorney for Petitioners
2904 Langer Lane
R.R.4 - Box 200
Bismarck, North Dakota 58504
(701) 223-4643

6742
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QUESTIONS PRESENTED FOR REVIEW

Unconstitutional Taking

1. The Army asked Congress to condemn the land and Congress refused. The Army took it anyway. Is this permissible?

Denial of Jury Trial

2. Had the taking been authorized by Congress, trial by jury would have been allowed. Can a jury trial be denied where the taking was not authorized?

Trashing the Court

3. After the case was brought, the court was trashed and a new entity created with fixed terms. Does such a court meet the independent judiciary standards established by the Constitution particularly in an action against the sovereign for a constitutional violation?

Due Process Impediments

4. Is the right to just compensation limited to those who have sufficient funds to overcome the impediments deliberately developed by the United States Justice Department?

Destruction of Evidence

5. The Justice Department first denied petitioners access to federal agencies (its clients) and then ordered reports and findings delayed and finally ordered them destroyed. The trial judge repeatedly refused to allow a hearing. Is this permissible?

Bribing the Court

6. Although there was an overwhelming vote in Congress denying a raise, the respondent's attorney gave an official attorney general's opinion which granted the raise, thereby giving the trial judge a $10,000 a year raise.

Contemporaneously the trial judge dismissed this case and declared that thereby the question of destruction of evidence by the Justice Department became moot. Is this bribery, is it permissible, and does it corrupt the independence of the judiciary?

Whitewash

7. On oral argument the appellate court demanded counsel's view on their salary increase and their independence. Is it appropriate for an appellate court to so inquire? Was the terse, non-tutorial opinion a whitewash on their salary question?

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The undersigned attorney, on behalf of petitioners, petition for writ of certiorari for review of the judgments of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported as is the opinion of the Claims Court.

STATEMENT OF JURISDICTION

The decision of the appellate court was filed November 19, 1987. The decision of the Claims Court was filed February 11,

1987. The jurisdiction of this Court is invoked under 25 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the United States Constitution involved are Article 3, Section 1 and Amendments 5 and 7 (omitted here but printed at p. 35a of the Appendix, *infra*).

STATEMENT OF THE CASE

The Facts

Originally when the Oahe Dam and Reservoir was under consideration, the Corps of Engineers advised Congress that they needed the river land north to the Bismarck Memorial Bridge, but in 1954 agreed to move the taking line 11.2 miles downstream. On September 6, 1961, the Corps wrote landowners and said none of their land would be required for the Oahe Reservoir Project. Only after this assurance from their government did landowners pour in the time and money to preserve and protect their land.

The pre-dam ordinary high water mark on the subject land was at a stage of 5.66 feet. This was in 1945, an index year selected by the Corps as unaffected by the drought of the thirties or the filling of the reservoirs.

But the Corps wanted to make hydropower in the wintertime which would require the release of water under ice conditions. The downstream states would not tolerate the dangerous conditions which result with the channel capacity diminished by ice. So the Corps adopted a program that the only place on the Missouri they would make large water releases in the wintertime would be in North Dakota. As a result, the Corps deliberatedly floods each winter at Bismarck to a thirteen foot stage, and exceeds that stage repeatedly.

The Corps has been admitting for twenty years that it is flooding land on which it has no flowage easement. Annually it reports the problem is under study.

The Corps also confesses that the changes in the capacity of the channel at Bismarck are due to the Corps operation of the river. The bottom of the channel is filling up at Bismarck with the dirt washed off the banks upstream. When the bottom comes up, so does the top of the river in any given flow.

The Corps has admitted that there still is erosion but no longer any accretion. Bankowners lose high firm land but no longer gain high firm land. The Missouri is becoming a wide, shallow river with many sandbars. But it is doing this at the expense of the riparian owners.

In theory there is a procedure that provides payment for a government taking. If one's property is confiscated by the government for public purposes, one can sue in the United States Court of Claims under the doctrine of inverse condemnation. Landowners finally commenced an action in the Court of Claims on April 13, 1981 for the taking by the Corps of three hundred of their acres through unauthorized flooding and erosion.

This put the landowners at the mercy of the Justice Department which erects multitudes of barriers to an expeditious determination of a claim. Those who are comforted by the thought that a citizen can find redress for his grievances in the Court of Claims are not familiar with the United States Justice Department's capacity to fight a war of attrition.

In a similar case settled in 1984 involving South Boston, Virginia, the government "spent $1 million on the case." Few citizens can afford such an ante or risk such a loss.

While this case was in the United States Court of Claims, the government eliminated the United States Court of Claims through the Federal Courts Improvement Act of 1982, and created the Claims Court. In this new court the judges would have limited terms and again there would be no juries. The government placed this case in the new Claims Court court.

By June 1984, the Justice Department apparently understood the landowners' case and announced to the Claims Court on June 25, 1984: "Defendant believes that this case involves no disputed issues of fact and that Summary Judgment is the most appropriate way to proceed. . . . Defendant has now completed all its discovery."

There appears to be two events which then triggered the Justice Department's questionable behavior.

In August, 1984, the Corps came to Bismarck and publicly announced it was going to have to flood or wash away 6,000 acres in south Bismarck which included all the land in dispute in this action and thousands of acres more.

Secondly, in October of 1984 the Corps was embroiled in an inverse condemnation case involving land in South Boston, Virginia. The Engineering News Record of November 8, 1984 expressed in its headlines "LAWSUITS LOOM FOR THE CORPS." The article begins:

> The Corps of Engineers tacit admission of past mistakes in a Virginia flooding case, its continuing battle with landowners along the Ohio River and some dissension within its own ranks are offering potential litigants new hope that in the words of one attorney "the once-invincible Corps can be defeated."

(ENR, November 8, 1984). The financial exposure of the government became enormous.

In the instant case the Claims Court's flat acceptance of the Justice Department's unsupported assertions that the Corps of Engineers' studies on the land in question were in the deliberative process had foreclosed any discovery in the Court of Claims.

The study that the Claims Court determined to be in the deliberative process, and therefore unavailable under landowners' Demand for Production, was complete enough for the Corps to make a public announcement which shattered property values tremendously. Petitioner Dakotaville, for example, which sold a lot for $40,000 cash just two weeks before the Corps' announcement, has not sold another lot since that August 1984 report four years ago.

The numerous Bismarck property owners organized, and landowners' attorney was elected to the Executive Committee. Congressman Dorgan brought the Corps officials to Bismarck to report on what was wrong and why, and what the Corps proposed to do about it.

The Corps reported to the hundreds of people at the meeting that the way they were operating the dams and reservoirs created a great deal of money from hydropower revenue. The Corps reported they could operate the dams either for flood control or for money from power. They reported they operated the dams to prevent flooding downstream from the Dakotas and to produce hydropower by flooding the land at Bismarck each winter and by washing the land upstream from Bismarck into the river.

The Corps promised the Congressman and the citizens a written report at a very early date. The state's two United States Senators added their weight to the demand and the Corps promised

them also that the report would be promptly forthcoming.

On October 5, 1984, the Corps publicly announced the completion of sedimentation and hydrologic studies to identify what land was being flooded and what lands would be required for condemnation.

On January 16, 1985, landowners made and served a Demand for Production of Documents. The demand called for the announced studies. On February 5, 1985, the court instructed the clerk to return the demand unfiled. On February 19, 1985, the respondent refused to produce the reports, claiming they were protected "by defendant's attorney client privilege" and "attorney work-product privilege."

On January 31, 1985, landowners filed a Status Report, as required by the Claims Court, in which it was pointed out that according to the Corps' reports it would appear the respondent now conceded many of the allegations made by petitioners in its petition. This was based upon the written material presented to the Bismarck citizens by the Corps and which would be detailed in the full technical study of the Corps which the Corps said would be forthcoming shortly.

The Justice Department's reaction was to protest to the judge in the Claims Court. On March 18, 1985, the respondent complained to the court that Mr. Mills had been getting public information from the Corps as a member of a property owner's committee and asked the court "to decline to accept as evidence or consider for any other purpose any information obtained by petitioners through any unauthorized contacts with the Corps of Engineers by plaintiff's counsel."

On March 28, 1985, landowners made and served their Reply to Defendant's Motion to Suppress. The reply asked for a ruling on four questions:

1. Does Mr. Mills (landowners' counsel) have a right to put before the court information obtained through the methods described?

2. Should the Corps of Engineers' voluntary confession be suppressed?

3. Does the Corps' admissions constitute admissible evidence as admissions against interest and admissions by the respondent?

4. Is the United States Justice Department in violation of the criminal laws against the obstruction of justice or in contempt of court?

On August 3, 1985, pursuant to instructions from the court, the reply was returned unfiled. (January 27, 1987, was the last occasion it was again returned unfiled.)

On June 4, 1985, respondent filed a 320-page Motion for Summary Judgment. The respondent objected to any extension beyond the 28 days allowed for petitioners to reply. The court granted petitioners until August 12, 1985 in which to respond. The petitioners' 36-page Brief and 62-page Appendix was made and served August 9, 1985.

The Corps' report, "Oahe-Bismarck Area Studies", had been completed in June, 1985, and was dispositive of the question of liability. But the Justice Department directed the Corps of Engineers to keep the completed report in the deliberative process and not produce it in time for landowners' August 12, 1985 deadline, so the landowners' response was made without the report.

The Justice Department had ordered the report of the Corps destroyed. Congress had ordered the report produced. The Corps tried to please both, and on August 12, 1985, produced two copies

for the North Dakota State Water Commission (obeying Congress) and destroyed all others (obeying Justice Department). That report is dispositive of all issues except compensation.

The landowners demanded a hearing on the destruction of evidence. It was returned by the court and re-filed a number of times. On February 11, 1987, the judge dismissed the landowners' case and said the conduct of the Justice Department was thereby moot.

So the matter was appealed to that court designated by the Federal Courts Improvement Act of 1982. A brief had been submitted, but it was the questions at oral argument that appeared to establish the dispositive issue on appeal.

Chief Judge Markey presided. His inquiry related to the question of judicial independence and the salary increase which he had received at the same time as the trial judge.

Judge Markey had recently presided at an assembly of judges and lawyers who took up over two hundred pages of reported material in the Federal Rules Decisions. The thrust of the material was that judges should be paid more, should not have to make tutorial opinions, and should be allowed to politicize.

Basis for Federal Jurisdiction of First Instance

A review of the judgment of a federal court is sought. Although the petitioners sought relief in the United States Court of Claims, the petitioners were compelled to do so because "it was the only game in town." The government has not provided a forum where petitioner could have its constitutional right to a jury trial. Therefore, the petitioners were compelled to adopt the provisions of 8 U.S.C. § 1491 which provided a forum, sans jury.

REASONS FOR GRANTING THE WRIT

The petitioners disagree with the trial court's decision on the merits and the appellate court's affirmance of that decision. Certiorari is not a writ for review of the merits. But what should be of concern to the Supreme Court is whether the landowners were afforded the constitutional rights and protections required.

I.

Unconstitutional Taking

The Army asked Congress to condemn the land and Congress refused. The Army took it anyway. Is this permissible?

It is clear that only Congress can authorize condemnation:

> Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function, " 'for Congress and Congress alone to determine.' *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 240 (1984), quoting *Berman v. Parker,* 348 U.S. 26, 33 (1954)."

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 L.W. 4781 (United States Supreme Court, Case No. 95-1199, June 19, 1987).

The Corps defined the "intial acquisition of land for the Oahe project" upstream to the "Bismarck Memorial Bridge. Because of public opposition . . . the Oahe project boundary line was drawn 11.2 miles downstream of the Memorial Bridge." (Technical Summary, Oahe-Bismarck Area Studies, June 1985, Pl. Ex. P.62/I-2). The land involved in this suit is in that 11.2 mile area.

On March 13, 1978, the Corps recognized that it did not have authority to acquire the subject property and wrote: "we would expect to obtain appropriate authority and funds to acquire the same rather than expect the landowners to seek relief by inverse condemnation proceedings." (Letter Division Counsel to Mills, Pl. Ex. P.41).

The United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty or property without due process of law. Nor shall private property be taken for public use without just compensation.

U. S. Const., Amend. 5.

In most litigation of the nature of the action here, the question is one of just compensation. But the issues here go beyond just compensation — it is a question of due process. In this case did the Army Corps of Engineers have the authority *to take at all*? We think not.

When construing the Constitution, it is helpful to examine the problems that the provisions was to solve. The Declaration of Independence points out the problem:

> He Has affected to render the military independent of, and superior to, the civil power.

(Dec. of Ind.).

The Army desired the land. When the government properly condemns land, you can only litigate value. While this seems too harsh a process for our form of government, its reasonableness has been explained. Only Congress can decide to take private

property for public use and one body of Congress can be replaced every two years. Due process is satisfied by the right to select the Congress.

So operating within the system, we (and others) elected a Congress that in 1954 refused the Army's request to take this land and the Army announced that it had moved the taking line 11.2 miles downstream.

In 1961 landowners asked the Army if this land would be taken, and the Army said no. So landowners began a process of development to make the land more valuable. But soon the Army began systematically flooding the land in order to prevent downstream flooding and produce hydropower revenues.

No one takes the position that a person has a right to maim someone simply because the assailant can pay just compensation. Why support a proposition that the Army can invade and occupy private property without authorization from the civil authority because they are able to pay just compensation?

II.

Denial of Jury Trial

Had the taking been authorized by Congress, trial by jury would have been allowed. Can a jury trial be denied where the taking was not authorized?

The Seventh Amendment to the Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact,

> tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

(U.S. Const. Amend. 7).

We can understand what problem this provision was to solve by examining the Declaration of Independence:

> For depriving us, in many cases, of the benefit of trial by jury.

(Dec. of Ind.).

It might be useful to reflect on what the fight was about. In the year 1215 at Runnymede certain rights of freemen were laid down in the Magna Carta. Repeatedly this document sets out that freemen shall not be deprived of their land except upon the lawful judgment of their peers. It also provides that the proceedings shall be in some place certain. Later, in 1628, it was laid down in the Petition of Rights

> that no man of what estate or condition that he be, should be put out of his lands or tenements . . . without being brought to answer by due process of law.

(Pet. of Rights, P. IV).

In the Bill of Rights in 1689 we find doctrine on the selection of jurors:

> That jurors ought to be duly impaneled and returned and jurors which pass upon men in trials

for high treason ought to be freeholders.

(Bill of Rights).

So we know that one "benefit of trial by jury" was that a freeholder could not lose his land except by the lawful judgment of his peers, with due process, and a properly impaneled jury.

When Congress authorizes the taking of private property for public use, the law makes provision for a jury trial presided over by a judge with lifetime tenure. The trial will be held in the citizen's community.

But there are no provisions for a trial by jury when the government unconstitutionally takes private property for public use. It is understandable that no statute has been enacted to provide relief when a government agency steals land because this is not supposed to happen. Yet some method of penetrating governmental immunity was sought, and relief seemed possible in the United States Court of Claims. Although the right to a jury trial was gone, at least the court was prestigious. It was not below some Court of Appeals; it was just below the United States Supreme Court.

III.

Trashing the Court

After the case was brought, the court was trashed and a new entity created with fixed terms. Does such a court meet the independent judiciary standards of the Constitution in an action against the sovereign for a constitutional violation?

The Constitution provides:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

(U.S. Const., Art. 3, Sec. 1)

But the Constitution put a limitation on this power delegated to the Sovereign. The problem that had occurred with King George was

> He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

(Dec. of Ind.)

To solve this problem the Constitution provides:

> The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

(U.S. Const., Art. 3, Sec. 1)

There are regulatory agencies, committing magistrates, and many others within the federal system that perform judicial functions and the absence of lifetime tenure in their job is not the question in this proceeding. We are not considering the question of what hand shall hold the lance or whether form 1040 can be signed with a pencil.

What we are dealing with in the present litigation is the king's

army taking by force. We are considering a problem of major concern for seven hundred years!

> No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

(Magna Carta #39)

> . . . and by this our present charter confirmed, for us and our heirs for ever.

(Magna Carta, first paragraph)

And what happened to those from whom the sovereign took the land?

> If anyone has been dispossessed or deprived by us without the legal judgment of his peers, of his lands, castles, liberties, or right, we will forthwith restore them to him.

(Magna Carta, 52)

The Federal Courts Improvement Act of 1982 created this United States Claims Court. "(T)he Judges" do not "hold their offices during good behavior . . . ." At the recent hearings on the Judge Bork nomination, Senator Arlen Specter expressed the view that the permanence of a judicial appointment was one of the most important ingredients in the checks and balance system.

When is judicial independence less necessary? Perhaps when Mrs. Jones divorces Mr. Jones or the Browns adopt a child.

When is judicial independence imperative? It is imperative when the United States Constitution clearly says it is; when the United States Constitution provides for a right such as just compensation; when the Congressional branch refuses to authorize condemnation and consequently its attendant right to a jury trial and payment; when the Executive branch through the Army seizes property and refuses to pay for it. When the Executive branch, through the Justice Department, suppresses and destroys evidence to delay or avoid payment or precedent.

If a Court found that the Justice Department destroyed evidence, one can assume this would embarrass the Justice Department. There can be no serious dispute that the judges selected for service within the beltway are selected by the Justice Department. At the same time, in the Claims Court the Justice Department is always the lawyer for the respondent.

Court improvement acts have been tried before, and we adopt the comment on this sort of thing contained in the Bill of Rights:

> That the commission for erecting the late Court of Commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious.

(Bill of Rights)

An independent judiciary is a constitutional right. If this is accepted, we proceed to the hard question — how is this right to be protected? It is not self executing. By whom can the quality of this protection be challenged? By whom shall it be enforced? By whom shall its existence or atrophy be judged?

IV.

Due Process Impediments

Is the right to just compensation limited to those who have sufficient funds to overcome the impediments deliberately developed by the United States Justice Department?

There is a paradox in the nation's system of law and order. If the First National Bank was robbed, there would be police and federal agents there immediately and prosecution would be intense and paid for by the government. Bank robbery, after all, is against the law. There is a statute against such conduct.

But if the Missouri River bank is stolen, there are no government agents investigating. There is no prosecution paid for by the government. This type of bank robbery is not prohibited by statute. There is only a constitutional provision prohibiting such conduct.

Some who fought for justice have given up. Consider the South Boston, Virginia, case settled by the Corps for five million dollars in late 1984 (U.S. Court of Claims, Nos. 238-80-L and 168-81-L). There is no decision to cite. However, comments by the participants are enlightening:

> Norman E. Hay, a Cannelton, Ind. lawyer, says he knows why the Corps ignored its own findings and guidelines. "If they told an honest story to Congress about how much these projects would cost and what impact they would have upstream, the projects wouldn't get funded," he complains.
>
> The Virginia group had filed suit against the Corps in the U.S. Court of Claims, asserting that the

> Corps had unconstitutionally taken their land without compensation by underestimating the upstream effects of the John H. Kerr flood-control dam.
>
> "I've had enough" of fighting the Corps in Court, says Virginia legislator Frank M. Slayton, part of a legal team that recently won a $5 million out-of-court settlement from the Corps (ENR 10/25/p. 5). According to one estimate, the Corps spent $1 million on the case. "They'll spend whatever they have to if anyone else takes them on" says Slayton.

(ENR Nov. 84)

At one time the United States Justice Department took its stance from a proposition that had the imprimatur of the United States Supreme Court: "The government never loses when justice is done." Things have changed.

Recently on television Attorney General Meese presented the current policy. He "must protect the government against avaricious lawyers who seek to obtain lucre by suing their government."

But Meese is burning down the house to get rid of the mice.

At Bismarck a legal seminar was presented on "Unfair Trial Tactics". The teacher was Mr. Dombroff, recently "Director, Torts Branch, Civil Division, Department of Justice, Washington, D.C."

Among the tactics was to never agree to any extension or continuance. Another was to seek the disqualification of opposing counsel. He applauded the costs you can cause your opponent with a motion for summary judgment and points out that any

litigation can be turned into a battle of experts and exquisitely expensive.

While addressing discovery, he recommends the attorney work-product ploy, but concedes this tactic has been weakened "through reexamination by the courts", a form of the big one that got away.

When the Corps announced in August of 1984 that they were going to take 6000 acres in Bismarck, a lot of people were upset and they organized. While the 300 acres in this case were included, the petitioners' lawyer personally owned hundreds of acres that were involved. The Congressional delegation and State officials were compelling the Corps to provide information on the 6000 acres, which information obviously related to the 300 acres in the suit. This information was public, but diametrically opposed to many contentions of the Justice Department's hired expert.

The Justice Department used a Dombroff's tactic, "try to disqualify the other lawyer." The court refused to allow a hearing, so the sword of Domoceles hung suspended over landowners' counsel.

The Justice Department followed a Dombroff rule with a motion for summary judgment. Hundreds of pages of supporting documents from government experts were incorporated.

Petitioners sought an extension to answer beyond the customary 28 days. The Justice Department applied another Dombroff's rule and vigorously resisted any extension, yet the government had received extensions in the case totalling 401 days.

The Justice Department followed another Dombroff's rule and turned the case into a battle of experts.

The Technical Study prepared by the Corps of Engineers over date of June 1985 was a report by the expert of experts, the Corps. The report was dispositive of the liability issue. That document and the two-volume study done by the North Dakota Water Commission on the very land involved surely met the landowners' needs for expert testimony.

Then the Justice Department used a tactic that even Dombroff had not suggested. They destroyed the Corps report.

The government outside experts were paid thousands and thousands of dollars on a contract "to develop a defense to an action in inverse condemnation brought by William Mills". It must be assumed that hiring experts to counter them would also cost thousands of dollars. Yet the recovery by petitioners for expert witness fees would be taxable at an amount not exceeding $30 a day. (*Crawford Fitting Co. v. J.T. Gibbins, Inc.*, Nos. 86-322- and 86-328, announced June 15, 1987, 55 L.W. 4820).

Constitutional protection and due process should not be a high ante poker game only the rich can play.

V.

Destruction of Evidence

The Justice Department first denied petitioners access to federal agencies (its clients) and then ordered reports and findings delayed and finally ordered them destroyed. The trial judge repeatedly refused to allow a hearing. Is this permissible?

In June 1984, the Justice Department announced that it had completed discovery. Its experts had assembled their reports and the Justice Department announced that there were no genuine issues and announced they would seek summary judgment. On

January 11, 1985, the court inquired as to the respondent's motion for summary judgment, that in June 1984 was promised to be made by September 1984. That motion was finally made by respondent May 31, 1985.

In view of the fact that in August of 1984 the Corps made a public announcement that it was flooding the land and would have to buy it, the motion seemed peculiar. Investigation disclosed correspondence was sent to the Corps by Congressman Dorgan on May 10, 1985, and stated in part:

> Col. West, I must tell you that we just will not find acceptable any decision by the Corps to back off its commitment to us in order to appease the U.S. Justice Department. . .
>
> Why is it taking so long for the Corps to finish its report? What role does the Justice Department have in redrafting this report, which was so close to conclusion before the Justice Department stepped in? And finally, is the Corps attempting to redefine the problem of Fox Island in such a way as to get the Justice Department off the hook?

Demands for production were repeatedly made by petitioners. The matter was raised in petitioners' Status Report January 31, 1985. It was raised again on March 28, 1985, in petitioners' reply to respondent's motion to suppress. The protests were ignored or returned unfiled.

On June 19, 1986, an affidavit of William R. Mills was filed in support of petitioners' reply to respondent's motion to suppress which reply asked for a ruling on "4. Is the United States Justice Department in violation of the criminal laws against the obstruction of justice or of contempt of court?"

The Justice Department had on a number of occasions raised matters while making a "Status Report" and that method seemed to result in a hearing instead of a "returned unfiled." So on December 20, 1986, in connection with a response to the Justice Department Status Report and the motion contained therein, the petitioner made and served its "Request for Determination."

This document related the past demands, the Justice Department's direction to hold the material in the deliberative process, and ultimately to destroy the copies. While the document itself is in the appendix, we repeat the questions on which a ruling was requested.

> How much Justice Department concealment of evidence is judicially acceptable? What personal threats by the Justice Department against litigant's counsel are permitted? What economic resources are essential to successfully recover from the government for government theft?

In the motion it was pointed out that if the court was without power to control the conduct of the Justice Department, perhaps Congress would need to enact appropriate statutes. But in any event, we need a ruling.

> So we all recognize that cases brought serve more than the determination of an award in a piece of litigation. If they did not, why would we print and publish the courts' decisions? As an obligation to other claimants who follow these plaintiffs' paths, we need a ruling.

The answer to the guidance that was sought appears in a footnote in the "Opinion":

> 1) Plaintiff also filed another document entitled "Request for Determination" on January 27, 1987. Although it is difficult to discern what the plaintiffs seek in this document, it appears that the plaintiffs are asking for a motion to compel the production of a certain water study, in addition to generally letting off steam. In any event, in view of the decision reached in this opinion, the "motion" is denied as moot.

As I understand his theory, it was that since the Justice Department had destroyed the evidence, the landowners could not prove the case, and since the case could not be proved it was dismissed, and since it was dismissed, the question of the Justice Department's conduct was moot.

There is no murder because the victim died.

VI.

Bribing the Court

Although there was an overwhelming vote in Congress denying a raise, the respondent's attorney gave an official Attorney General's opinion which granted the raise, thereby giving the trial judge a $10,000 a year raise. That same day the trial judge dismissed this case and announced that thereby the claim of destruction of evidence by the Justice Department became moot. Is this bribery, is it permissible, and does it corrupt the independence of the judiciary?

Bribery is defined by Black as "the offering, giving, receiving,

or soliciting of anything of value to influence action as official or in discharge of legal or public duty." (Black's Law Dictionary. 4th Ed.). We are not suggesting that we could establish that the raise of judicial emoluments was *quid pro quo* relieving the Justice Department of an embarrassment. But we do suggest that the judiciary, like all the rest of us, are reluctant to bite the hand that feeds them.

We have seen a great deal of probing in the judicial selection process to figure out what the prospective judge would do on a certain issue. If his apparent decision is one way, he is supported by the Republicans, and if the other, by the Democrats. A North Dakota Democratic Chairman once responded to the question of what was the difference between the Republicans and the Democrats. His answer was that "The Republicans do free what you have to bribe a Democrat to do." His statement was as prejudicial as it was pragmatic. While bribery has become a bit passe, the new method of appointing judges with a suitably satisfactory conditioned response may be equally abhorrent. Consider the modern message formulated at the recent symposium, chaired by Chief Judge Markey:

> I submit that the present work overload is going to get much worse as Gramm-Rudman philosophy becomes more accepted unless the court itself takes a new turn and becomes very active in the political arena defending the right of the constituents of the court—the parties with cases before the court—to have their cases timely considered, graciously and well considered. I would encourage the court to consider the need for the court to get into the political arena and represent this constituency that needs to have the court consider their cases both timely and well. The first step must be to get the law changed which prohibits

> judges from politicing, or else studying how to bend that law appropriately as the court has bent rule 52(a) and the bias against dictum for practical needed reasons in its first three years.
>
> Let us say thanks to the men and women who make up the Court of Appeals for the Federal Circuit for a superb job well done, but, of course, we all know that does not mean that there is not still a lot of work to do. Excellence is the most continuously demanding goal in human experience.
>
> CHIEF JUDGE MARKEY: Thank you, Tom, and well done.

(Judicial Conference - Federal Circuit, 112 F.R.D. 439, 454)

Congress has done most outrageous things on the perceived need to horse trade. Now the judiciary wants to get into the act. The "this for that" of horse trading is the sophisticated version of bribery.

On February 2, 1987, the Washington Post National Weekly Edition quoted Federal Judge Joseph L. Tauro as saying, "Whenever two or more judges get together the question of finances dominates their conversations." A similar view was expressed in that same article by former White House counsel Fred F. Fielding, who screened judicial candidates for the Reagan administration for five years when the Attorney General was a member of the White House staff.

The Claims Court judge in January of 1987, had a salary of $72,300 a year. The annual salary recommended by the President was $82,500. The President transmitted his recommendation to Congress on January 5, 1987.

On January 29, 1987, the Senate by a vote of 88 to 6 passed Senate Joint Resolution 34 disapproving the President's pay recommendations for federal officials.

On January 29, 1987, the Senate by voice vote attached the same disapproval language to House Joint Resolution 102 and this passed by a vote of 77 to 6.

On February 4, 1987, the House accepted the Senate passed pay disapproval language when it voted to suspend the rules and agree to House Joint Resolution 102.

On February 12, 1987, the President signed H.J. Res. 102 but announced that because of an opinion from his attorney general, the House disapproval "is without any legal force and effect."

There was a great question. Did the House act in time? Some say the thirty day limit ended February 3, 1987, at midnight because that was thirty days from when the President sent the message. Others say the thirty days was not up until midnight February 4, because when Congress received the message is what counts.

While the enacting of laws by some process of not enacting is somewhat new and novel, the sovereign's purpose in such hanky-pank is as old as the Bill of Rights:

> That the pretended power of suspending of laws or the execution of laws by regal authority without consent of 'parliment is illegal.

(Bill of Rights, 1689)

During the hearings on the nomination of Judge Bork to the Supreme Court we have observed a great deal of profound

analysis on the Constitution and the courts. The two front running items seem to be judicial review as a safeguard to overreaching by the other two branches and the independence required of the federal judiciary in order for the system to succeed.

If it is contended in order to preserve the judge's independence that a judge's salary cannot be reduced, what if the rupture is created by increasing the salary? Is is realistic to suggest that a judge can be controlled by diminishing emoluments but not by increasing them?

Were the judges salaries reduced, it would be easy. It would be unconstitutional and the judges would not have to deprive themselves to so hold.

If the increase in salary was enacted in a separate bill for the courts, it would not be as suspect as a salary raise for everyone including the judges who have to rule on the legality of it for all.

If the raise had not been created through the back door with precedent of Alice in Wonderland—verdict first and trial afterwards—it might be more acceptable and less suspect.

But to have Congress express its wishes that the judge not get the raise, and the Attorney General overrule Congress in favor of the judge, and that same day the judge get rid of a distasteful exposure of the Attorney General's conduct?

VII.

Whitewash

On oral argument the appellate court demanded counsel's view on their raise and independence. Is it appropriate for appellate courts to so inquire? Was the terse, non-tutorial opinion a whitewash on their salary question?

An appeal was taken to the United States Circuit Court of Appeals for the Federal Circuit. At oral argument Chief Judge Markey, who presided, asked petitioner's counsel if he would withdraw the charge of "prejudice" against Judge Yock of the Claims Court. Counsel explained his appeal was on the absence of an independent judiciary as the constitution requires. Judge Markey announced that the brief speaks for itself. He then demanded counsel's view on whether he and his brethren on the Circuit Court (who also got a raise) were impartial. Pressed to give an opinion, counsel pointed out that the respondent's attorney, according to the Washington Post that morning, was bestowing titles to get Circuit Court judges to go into retirement so respondent's counsel could select more judges.

There is some question of propriety in an appellate judge asking a litigant's counsel what counsel's views are on the qualification of the presiding appellate judge. It seems that to operate within the system, counsel is required to respond truthfully under his duties as an officer of the court. Counsel's response was courteous, honest, discreet, and respectful. Was it also dispositive of the appeal?

The opinion reads as follows:

> Appellants' cases were filed in the United States Court of Claims in 1981 seeking compensation for an alleged taking of land due to frequent and recurring flooding, erosion and ground water inundation, purportedly caused by the United States Corps of Engineers control of the flow of the Missouri River.
>
> The Claims Court, having provided appellants more than ample opportunity, correctly dismissed the complaint under Rules 37(b)(2)(C) and 41(b)

> for failure to comply with the court's discovery order and for failure to prosecute.
>
> We have fully considered appellants' arguments relating to due process, factual allegations, and the status of the Claims Court and find them without merit or relevance, dismissal of the complaint having been justified for the reasons cited by the Claims Court.

While we understand the concept of the appellate court affirmance based on a dispositive issue, we respectfully disagree with their decision on that issue. But our objection goes deeper as we expressed to the appellate court.

1. Can the United States Justice Department destroy evidence with impunity?

2. Can the Army seize private property when Congress has refused them?

3. Is a judiciary constitutionally independent when its appointment and salary increase and re-appointment are controlled by the Justice Department?

4. Are the requirements of due process met when the respondent's lawyer appoints, remunerates and controls the re-appointment of the judges?

5. Is the right to a jury trial satisfied by its availability when Congress authorizes a taking, but denied when the taking is unconstitutional?

The Justice Department is a loose cannon on the ship of state and must be bound down, not camouflaged from view.

CONCLUSION

In theory the republic was balanced by the citizens being Whigs and Tories, or Republicans and Democrats. But today the actual division is between the bureaucrats and the citizens, not too far different from prince and commoner. In two hundred years we have gone the circle from the divine rights of kings to the divine right of cronies.

The people are no longer stronger than those who govern them. The Constitution is no longer stronger than the statutes.

Isn't it the function of the Supreme Court under the doctrine of judicial review to curtail the excesses of the executive and legislative branches? If not now, when? If not here, where?

The year I began to practice law there appeared an item in the London Times:

> The greatest tyranny has the smallest beginnings. From precedents overlooked, from remonstrances despised, from grievances treated with ridicule, from powerless men oppressed with impunity and overbearing men tolerated with complacence, springs the tyrannical usage which generations of wise and good men may thereafter perceive and lament and resist in vain.

(London Times, 1946)

Respectfully submitted,

s/ William R. Mills
WILLIAM R. MILLS
Attorney for Petitioners

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1290

ANCHOR ESTATES, INC. and DAKOTAVILLE, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: November 19, 1987

Before MARKEY, *Chief Judge,* RICH, *Circuit Judge,* and BALDWIN, *Senior Circuit Judge.*

BALDWIN, *Senior Circuit Judge.*

DECISION

The United States Claims Court, 11 Cl. Ct. 578, February 11, 1987, dismissed appellants' two consolidated inverse

condemnation cases under Fed. R. Civ. P. 37(b)(2)(C) for failure to comply with court ordered discovery and under Fed. R. Civ. P. 41(b) for failure to prosecute the case. We *affirm*.

OPINION

Appellants' cases were filed in the United States Court of Claims in 1981* seeking compensation for an alleged taking of land due to frequent and recurring flooding, erosion and groundwater inundation, purportedly caused by the United States Corps. of Engineers' control of the flow of the Missouri River.

The Claims Court, having provided appellants more than ample opportunity, correctly dismissed the complaint under Rules 37(b)(2)(C) and 41(b) for failure to comply with the court's discovery order and for failure to prosecute.

We have fully considered appellants' arguments relating to due process, factual allegations, and the status of the Claims Court and find them without merit or relevance, dismissal of the complaint having been justified for the reasons cited by the Claims Court.

---

* Upon the establishment of the United States Claims Court by the Federal Courts Improvement Act of 1982, the case was transferred from the United States Court of Claims to the newly created United States Claims Court.

APPENDIX B — DECISION OF THE UNITED STATES CLAIMS COURT

In the United States Claims Court

(Filed: FEB 11 1987)

No. 228-81L

ANCHOR ESTATES, INC.

v.

THE UNITED STATES

No. 229-81L

DAKOTAVILLE, INC.

v.

THE UNITED STATES

Pleading and practice; involuntary dismissal; failure to comply with order to compel discovery, RUSCC 37(b) (2) (C); failure to prosecute; RUSCC 41(b).

William R. Mills, Bismarck, North Dakota, attorney of record for plaintiffs.

Fred R. Disheroon, Washington, D.C., with whom was

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Assistant Attorney General F. Henry Habicht, II, for defendant. Michele A. Guisiana, of counsel.

OPINION

YOCK, Judge.

These two consolidated inverse condemnation cases are before the Court on defendant's motion to dismiss for plaintiffs' failure to comply with the Court's order to compel discovery and for failure to prosecute. For the reasons discussed herein, defendant's motion is granted and the two cases are to be dismissed.

Background

On April 13, 1981, plaintiffs filed a complaint in the United States Court of Claims seeking just compensation for the alleged taking of their land by the United States. Plaintiffs claim that their land was taken by inverse condemnation as a result of the "frequent and recurring flooding [of their land, caused by] * * * the defendant's control of the flow of the Missouri River through dams, particularly the Garrison Dam and the Oahe Dam." Plaintiffs also claim a taking based on erosion and groundwater inundation caused by the defendant's control of the Missouri River flow. Defendant filed its answers in these cases on September 10, 1981.

Almost from the beginning, the parties have had difficulty with each other in conducting voluntary discovery, and have had to invoke the Court's intervention. For instance, on October 29, 1982, the defendant filed a motion to compel answers to its first set of interrogatories. After a review of the defendant's contentions in that motion, the Court found that the plaintiffs had, in fact,

answered the interrogatories in an evasive and incomplete manner and thus granted the defendant's motion to compel on November 18, 1982. Likewise on April 18, 1983, the plaintiffs filed a motion to compel answers to their first set of interrogatories. Since the plaintiffs were asking for water project studies that had not yet been completed by the Government, the Court denied the plaintiffs' motion based on the defendant invoking the deliberative process privilege. The Court noted, however, that the defendant did provide the plaintiffs with all the factual data underpinning the various water project studies at issue even though the opinions and recommendations would not be provided until after the projects were finalized by the Government.

Eventually, however, the defendant felt that it had conducted enough discovery to file a motion for summary judgment, which it did on June 4, 1985. After an extensive review of the briefings and other evidentiary matters submitted, the Court denied the defendant's motion because it believed that disputed issues of material fact were still present and that the matter could benefit for further ventilation at trial. *Anchor Estates, Inc. v. United States,* 9 Cl. Ct. 618 (1986). However, the Court took note of the lengthy and contentious discovery history of this case and ordered the parties to get into high gear. In its opinion of March 20, 1986, the Court concluded:

> For the reasons stated in the opinion, the Court denies the defendant's Motion for Summary Judgment.
>
> Having denied the Defendant's Motion for Summary Judgment, *the Court notes that this matter has been on its docket since April 13, 1981, some five long years.* Thus, the parties have had

ample and sufficient time to complete discovery and prepare for trial on all issues of liability and damages. This being the case, the Court hereby orders:

(1) *the parties shall complete all loose end discovery on or before June 23, 1986,* and will file a status report on or before that date;

(2) a *pretrial conference is scheduled for July 24, 1986,* to be held at the National Court Building, Washington, D.C.;

(3) *trial is set to commence on Tuesday, September 9, 1986 in Bismarck, North Dakota.*

IT IS SO ORDERED.

Anchor Estates, Inc. v. United States, supra, 9 Claims Ct. at 622 (emphasis added).

Following the Court's opinion and order, the defendant on April 14, 1986 filed a motion to change the date scheduled for trial from September 9, 1986 until October 6, 1986 since one of the defendant's expert witnesses would be unable to testify during the September time frame. There being no objection by the plaintiffs, the Court adjourned the motion on May 19, 1986 and reset the trial for October 4, 1986.

On June 23, 1986, the defendant as ordered, filed a status report which in pertinent part stated:

On May 27, 1986, defendant served its third set

> of interrogatories to plaintiff, pursuant to this Court's March 20, 1986 order that all discovery must be completed by June 23, 1986. Plaintiffs have not responded to that discovery. Plaintiffs have served no further discovery.
>
> The United States prepared to proceed with trial as scheduled on October 6, 1986.

Also on June 23, 1986, the plaintiffs filed their status report along with a motion for a protective order. The status report stated in pertinent part:

> With the exception of the Defendant's tardy Third Set of Interrogatories and Plaintiff's Motion for Protective Order, the case is ready for trial on or after the date set by the Court (September 9th, 1986).

The plaintiffs' counsel also indicated therein that he would have to review certain documents generated by the defendant's expert witnesses "in order to prepare for cross-examination."

The plaintiffs' motion for protective order requested the Court to quash the defendant's outstanding request for information set out in its third set of interrogatories. The plaintiffs' position was that the interrogatories were served on May 27, 1986 and since all discovery was to be completed by June 23, 1986, it could not complete the answers in time to be within the Court's designated discovery cutoff date since only 27 days remained. The plaintiffs noted that Rule 33(a) of the United States Claims Court provided for answers to be served within 30 days.

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On July 8, 1986, the Court issued its order which, among other things, extended the parties' discovery period from June 23, 1986 to August 22, 1986, with status reports due on that date, and thereafter denied the plaintiffs' motion for a protective order as moot. Thus, the plaintiffs were implicitly ordered to answer the defendant's third set of interrogatories. In addition, the parties were asked to confer and come up with a mutually acceptable date for a final pretrial conference in late August or early September. The Court again reiterated its earlier order scheduling the trial to commence on October 6, 1986 in Bismarck.

After receiving the pertinent information from the parties, the Court by order dated August 5, 1986, set the final pretrial conference date in this matter for September 9, 1986 in Washington, D.C.

On August 22, 1986, the defendant filed its status report as ordered, in which it stated that the parties had met on August 19 in Omaha, Nebraska and agreed to a stipulation which would be presented to the Court at the pretrial conference. No further alarm was sounded. However, on August 26, 1986, the defendant filed a supplement to its status report of August 22, 1986, in which it brought to the attention of the Court the plaintiffs' newly disclosed intention to employ expert witnesses. The supplement in pertinent part concluded:

> Defendant believes this state of the case requires immediate notification to the Court and is thus filing this supplemental report. Under the circumstances, defendant believes that plaintiffs should be precluded form adducing evidence at the trial from experts who were not extended close of discovery, or alternatively that the trial date now

> set for October 6 should be cancelled and a reasonable time for discovery afforded to defendant as to the matters as to which defendant has no prior opportunity to respond.

The plaintiffs filed their status reports on August 27 and September 2, 1986 by leave of the Court, and indicated no special problems were looming. Plaintiffs indicated they were prepared to proceed with trial on October 6, 1986.

On September 5, 1986, just four days prior to the scheduled pretrial conference, defendant filed a Motion for Sanctions or in the Alternative to Compel Discovery, alleging that the plaintiffs had willfully and continuously failed to answer the defendant's properly noticed third set of interrogatories and had thus deprived the defendant of its right to properly and adequately conduct discovery and defend this lawsuit. Specifically, the defendant's motion stated in pertinent part:

> 5. Defendant's counsel has on numerous occasions discussed the outstanding interrogatories with plaintiffs' counsel, who repeatedly stated that answers would be forthcoming. Most recently, counsel for plaintiffs and defendant met on August 19, 1986 in Omaha, Nebraska, at which time counsel for plaintiff again informed defendant's counsel that answers to the third set of interrogatories would soon be sent. Plaintiffs' counsel also indicated at that time that he had not hired any experts to testify as witnesses at the upcoming trial and that he did not know what other witnesses he might call.

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6. By letter of August 22, 1986 (attachment 4) [plaintiffs] purported to send answers to defendant's third set of interrogatories. A response allegedly answering interrogatories 3 - 8 was finally sent on August 27, 1986 (attachment 5). In response to interrogatories 4, 5 and 6, which requested information detailing expected testimony from experts, plaintiffs stated that the answers were either not known or not applicable. In response to interrogatory 7, which requested plaintiff to identify and supply and report prepared by any expert identified in the previous interrogatories, plaintiffs stated that the only report it was relying on (a report on the geohydrology of the South Bismarck area, Burleigh County, North Dakota, prepared by Steve W. Pusc, North Dakota State Water Commission) had been furnished at the August 19th meeting in Omaha. Their response to interrogatory 3 was similarly deficient. Plaintiffs stated in response to interrogatory 8, which requested the identity of any other proposed witnesses and documents they would rely on, and a summary of their testimony, that the information would be furnished in connection with the exchange of pretrial materials. These materials, however, merely listed 46 names without a summary of any testimony. Plaintiff has never answered interrogatories 1 and 2.

7. As part of plaintiffs' pretrial submission, sent to defendant September 2, 1986, plaintiffs sent a witness list containing 46 witnesses. None of these individuals was identified as an expert, although

resumes of the last two individuals were included, indicating them to be real estate appraisers. There has been no indication whether plaintiffs intend these appraisers to testify at trial as to the value of the lands in question in this litigation or whether appraisal reports have been or will be prepared by these individuals. Many of the individuals listed are not identifed and there is no indication what any of the listed witnesses will testify about.

8. Plaintiffs have clearly failed to respond to defendant's third set of interrogatories. Their claims should not be permitted to go to trial in light of their willful and continuous failure to answer defendant's properly noticed interrogatories.

In light of the plaintiffs' alleged willful and continuous failure to answer the Government's properly noticed interrogatories and the lateness of the hour, the defendant asked that the Court impose the extreme sanction of dismissal pursuant to Rule 37(b) (2) (C). Alternatively, the defendant requested the Court to delay the trial until such time as the plaintiffs have adequately answered the interrogatories and thereby giving defendant sufficient time to conduct discovery and thus prepare itself for trial.

In response to this motion, the plaintiffs filed their "Resistance to Sanctions" document on September 9, 1986, the date set for the final pretrial conference. Although the document was basically not responsive to the defendant's motion, it also bordered on being incomprehensible, as evidenced by the plaintiffs' concluding remarks:

Responding to Defendant's Motion for Sanctions, Plaintiffs argue no injury was done to Defendant.

Plaintiffs' counsel apologizes to the court for following the local informal practice of advising opposition counsel quickly and with integrity and not following the formal documented procedures apparently necessary and customary in Washington.

Having hopefully spoken to the mote in mine eye, could we not cover the beam in the others.

Mr. Disheroon directed his client to retain the June 1985 Technical Summary in the deliberative process until it could not be used before August 12 to resist his motion to dismiss. Mr. Disheroon failed to have his client retain a copy of this document formally sought under a continuing demand and informally promised after it surfaced August 12, 1985.

This document is most dispositive of this case. It was first kept overlong in the womb and when born, it was promptly aborted. Plaintiff obtained it through outside sources. The Defendant destroyed all available copies.

This may not constitute a customary infraction in normal arena of Washington out here in the outback we would call it obstruction of justice. It never occurs -- twice.

Needless to say, the first order of business at the scheduled

final pretrial conference held on September 9, 1986 in Washington, D.C., was to decide the defendant's outstanding motion for sanctions. Clearly there was no point in going forward with the normal pretrial conference procedures if the case was to be dismissed or even postponed pending further discovery.

After a thorough review of the defendant's motion with its supporting documentation, and during the course of the hearing held on September 9, it became readily apparent to the Court that plaintiffs' responses to the defendant's third set of interrogatories, dated May 27, 1986, were, in fact, grossly inadequate. As the Court's order filed on September 10, 1986 stated:

> These interrogatories requested basic and routine information about the plaintiff[s'] fact and expert witnesses, such as names, addresses, professions, position, educational background, summaries of their expected testimony, and copies of any expert reports. The plaintiff[s'] responses (finally furnished on August 22, 1986) indicated that no experts were to be called as witnesses, but that there were to be 46 fact witnesses. The plaintiff[s] failed, however, to list [their] fact witnesses' addresses or give a summary of their expected testimony. On September 22, 1986, seven days before the scheduled pretrial conference in this matter, [and eleven days after discovery was ordered to be complete] the plaintiff[s] indicated in a status report filed with the Court that [they] would call two expert witnesses at the trial * * *.

In the course of this hearing, it also became clear to the Court,

that after nearly five and one half years of litigation, the plaintiffs had not yet developed their litigation strategy and, therefore, were unprepared to proceed to trial. Because the plaintiffs were uncertain as to what factual contentions they were asserting, the plaintiffs could not determine what witnesses were needed to present their case and therefore could not provide that information to the Government so that it could properly prepare its defense to this case.

Although the Court believed that plaintiffs failed to engage in proper discovery and violated the Court's discovery orders to have completed its discovery by August 22, 1986, the case was not dismissed at that time. Again in its order of September 10, 1986, the Court stated:

> Since this case has gone on for five years, the Court was very close to granting the defendant's Motion and ordering the termination of this case for failure to engage in proper discovery and for violation of the Court's discovery orders. *However, out of an abundance of caution, and to give the plaintiff[s] a third and final opportunity to present [their] case[s] in a professional manner, the Court is not terminating this matter at this time for the plaintiff[s'] discovery failures,* but is granting the defendant's motion in the alternative. The Court is thus granting the defendant's motion to compel discovery, delaying trial to an appropriate future date, and imposing a strict schedule of activity on the parties * * *. [Emphasis added, footnote omitted.]

The Court concluded the September 10, 1986 order by establishing

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the following schedule which in pertinent part reads:

> 1. *Plaintiff[s] will complete all discovery in this matter on or before Tuesday, December 9, 1986. Plaintiff[s] [are] to start immediately to determine the necessary elements of [their] case[s] and to determine how [they] [intend] to present this matter to the Court. [They] [are] to fully answer defendant's Third Set of Interrogatories on or before December 9, 1986.* This includes, but is not limited to, providing the defendant with the names, addresses, and summary of expected testimony for each prospective fact witness and a detailing of professional qualifications for any expert witnesses the plaintiff[s] [have] retained. Any expert reports to be utilized by the plaintiff[s] will be given to the defendant, as well as all the other documents to be relied upon that have not already been given to the defendant by the plaintiff[s]. A status report by both parties will be filed with the Court on or before December 12, 1986. [Emphasis supplied.]
>
> 2. Defendant will complete all its discovery on or before Monday, March 9, 1987. A status report will be filed by both parties on or before March 12, 1987.

In its status report, filed December 12, 1986, defendant renewed its motion to dismiss for plaintiffs' failure to adequately respond to the interrogatories and for their failure to complete discovery as directed by the Court in its order of September 10, 1986. Defendant contends that the responses furnished by plaintiffs

to the Defendant's Third Set of Interrogatories were, again, "grossly inadequate" in content, and evidenced a failure to complete discovery, which warranted the extreme sanction of dismissal pursuant to Rule 37(b)(2)(C) of the United States Claims Court. Further, the defendant asserts that the same responses and the new plaintiffs' "Analysis (17 Nov. 86)" and "Project (18 Nov. 86)" documents submitted to the defendant, confirm that the plaintiffs have barely begun to prepare their case after nearly six years of litigation, thereby warranting dismissal of the case under Rule 41(b) for failure to prosecute.

The plaintiffs responded to the defendant's latest motion to dismiss with their document entitled "Resistance to Motion," dated January 27, 1987.[1] However, instead of responding to the defendant's contentions regarding adequacy and completion of discovery, the plaintiffs discuss why there is "no [expert] report specifically prepared for this case." The response also tends to confirm that the plaintiffs are blithely continuing with their discovery even in the face of the Court's orders to have completed it.

Discussion

I.

Rule 37 of the United States Claims Court states in pertinent part:

---

1. Plaintiff also filed another document entitled "Request for Determination" on January 27, 1987. Although it is difficult to discern what the plaintiffs seek in this document, it appears that the plaintiffs are asking for a motion to compel the production of a certain water study, in addition to generally letting off steam. In any event, in view of the decision reached in this opinion, the "motion" is denied as moot.

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Rule 37. Failure to Make or Cooperate in Discovery; Sanctions.

(a) Motion for Order Compelling Discovery.

* * * *

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, * * * or a party fails to answer an interrogatory submitted under Rule 33, * * * the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.* * *

* * * *

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

* * * *

(b) Failure to Comply with Order. * * *

(2) *Sanctions Against a Party.* If a party * * * fails to obey an order to provide or permit discovery, * * * the court may make such orders in regard to the failure as are just and among others the following:

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* * *

(C) An order striking out pleadings or parts thereof, or staying further proceedings unless the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

* * *

The defendant contends in connection with Rule 37 that the plaintiffs' latest responses to the defendant's Third Set of Interrogatories are again "grossly inadequate" in content and evidence the fact that the plaintiffs have not completed their discovery as directed by the Court in its order of September 10, 1986. These derelictions, the defendant asserts, warrant the extreme sanction of dismissal. That the defendant's assertions of inadequacy and incompleteness are true, are borne out by an examination of plaintiffs' responses to the defendant's Third Set of Interrogatories.

Interrogatories numbered 3 through 7 of the defendant's third set requested the following information:

3. State the name and present address of each expert you reasonably expect to call as a witness at the trial of this cause; and as to each such witness, state the following:

a. His profession;

b. His position or occupation, giving the name and address of his present employer, and the names

and addresses of all employers by whom he has been employed in a professional capacity in the last five years;

c. His educational background, including the names and addresses of all colleges or universities attended, the years of attendance, and the degrees earned;

d. The names and addresses of all professional societies or organizations of which he is a member or has been a member during the last five years; and

e. All magazines, journals, books, or other publications in which he has furnished any professional writing or dissertation; and as to each and every such writing or dissertation, give its title and subject matter, as well as the name, volume, year and page where such writing or dissertation can be found. * * *

4. With respect to each of your expert witnesses named in answer to the preceding interrogatory, state the following information with particularity:

a. The subject matter as to which the expert is expected to testify;

b. The substance of the facts and opinions to which the expert witness is expected to testify; and

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c. A summary of the grounds for each opinion.

5. As to each expert witness identified in response to preceeding [sic] question three, state:

a. Whether the person has testified as an expert or in a professional capacity in any judicial or administrative proceeding;

b. The style of the case in which such testimony was given and the date when the testimony was given;

c. The court or agency before which the person testified, and

d. The party on whose behalf the person testified.

6. As to each expert witness identified above, identify any exhibits or other documents the expert expects to rely on; and please furnish copies of such documents to defendant if they have not already been so provided.

7. Identify whether any reports relating to this litigation have been prepared by any expert witness identified above, and if so, please furnish copies of such reports to defendants.

In response to these interrogatories, the plaintiffs on December 5, 1986, identified seven expert witnesses that were to

testify and provided certain information to the defendant as to each. The defendant, however, alleges that the answers are "woefully and grossly inadequate," and that they confirm that the plaintiffs have only now, after almost six years have passed, begun to prepare their case. That the defendant's allegations are on the mark are confirmed by an examination of the answers submitted by the plaintiffs.

The first expert witness identified by the plaintiffs was Mr. Steven W. Pusc, a hydrologist with the North Dakota State Water Commission. The plaintiffs indicated that Mr. Pusc would be called to authenticate a groundwater study completed by Mr. Pusc for the State Water Commission. No other summary of his testimony or explanation of what he would testify to was given to the defendant. Also, the plaintiffs indicated that Mr. Pusc had not been retained by the plaintiffs and thus "are not in a position to require a response from him to respond to interrogatories on where and if he testified." Nor were the plaintiffs at liberty to provide any documents that he may have used in completing his groundwater studies. The defendant asserts that this response is confusing, evasive and incomplete. The Court agrees.

The plaintiffs' second witness is Mr. Harley Swenson, a civil engineer and land surveyor, located in Bismarck, North Dakota. The plaintiffs hired Mr. Swenson sometime in early September 1986 to prepare engineering analysis reports in regard to its claims of flooding, groundwater inundation and erosion. Again, there is no summary of what he is to testify to and the reports are not complete and available. As stated by the plaintiffs:

> 7. Reports have not been prepared at this time. Two posts have been installed scaled to sea level at each end of the properties and are being

> monitored for the freeze up innundation [sic]. After this material is available to check the preliminary material, a report will be made and opportunity to copy. At present, the report is in the deliberative process.

Clearly this answer does not conform to interrogatory 4b and is thus incomplete and inadequate. Moreover, this response convincingly confirms the fact that the plaintiffs' discovery is nowhere near complete in direct violation of this Court's order of September 10, 1986.

The plaintiffs' third witness is Mr. William L. Mills, an electrical engineer, located in Beaverton, Oregon, and is the son of the plaintiffs' counsel in this case. Mr. Mills is to provide computer assisted calculations and graphics in a report to be presented at trial in regard to the acreage flooded as a result of river stage and other matters. Again there is no summary of his expected testimony and the report is not complete and available. As stated by the plaintiff:

> Much of the material has been submitted to or received from Defendant. When the computations and reports are completed and checked against the ongoing measurements on the installed posts this winter, the material will be made available for examination and copying. In the meantime, some of it is in the deliberative process and the balance is readily available to Defendant from the sources indicated.

The plaintiffs' fourth witness is Mr. Richard Dreher, a sand and gravel operator, located in Mandan, North Dakota. Mr.

Dreher is to testify as a land value expert, and is expected to testify as to the presence of gravel in commercial qualities on the subject properties. Again, there is no summary of his expected testimony and the plaintiffs' answers advise that if any reports are to be prepared, they will be provided to the defendant at a later date.

The plaintiffs' fifth expert is Mr. Harry R. Arneson, Jr., a real estate appraiser, located in Fargo, North Dakota. Mr. Arneson is to testify to the value of the land allegedly taken, based on a 1973 land appraisal report. The plaintiffs categorically refuse to provide the defendant with a copy of the 1973 report, as evidenced by the following response:

> 6. The documents relied upon are listed in the appraisal report. After commencement of this case, John R. Schlotman, Staff Appraiser, U.S. Army Corps of Engineers, Omaha District, was provided with the report and examined same and made notes and copies. Efforts to obtain these notes and records from the Defendant resulted in a refusal to produce. If the Defendant can't find their copy, they can have access to ours for copying. They have personnel in Bismarck whom we would trust with our copy, and who would not lose it. We will not, however, make another copy.

In addition, there is no summary of the expert's expected testimony contained in the plaintiffs' answers, that would give the defendant some idea of the substance of what the expert was to testify to.

The plaintiffs' sixth expert is Mr. Lyle W. Porter, a real estate appraiser, located in Bismarck, North Dakota. Mr. Porter is to testify regarding the value of the land eroded away and the diminution in value due to the ground inundation. The plaintiffs' answers indicate that a real estate appraisal report has not been

prepared, however, if one is prepared, it would be furnished to the defendant.

The plaintiffs' seventh and final witness is Mrs. Betty L. Mills, the plaintiffs' counsel's wife and a resident of Bismarck, North Dakota. Although Mrs. Mills is not designated as an expert witness, plaintiffs indicate in their answers that she will testify to the value of the properties at issue. No information as to the support for her testimony was described or produced.

The answers discussed above clearly confirm to the Court that the plaintiffs have in fact failed to adequately respond to the defendant's interrogatories and failed to complete discovery by December 9, 1986, as ordered by the Court. The plaintiffs' answers were contentious, evasive, and incomplete. This inadequacy coupled with the failure on the part of the plaintiffs to complete discovery on a date certain as ordered by the Court fully justifies the extreme sanction of dismissal, pursuant to Rule 37(b)(2)(C).

If a party "fails to obey an order to provide or permit discovery * * * the court may make such orders in regard to the failure as are just" including, dismissal of all or any part of the action. RUSCC 37(b)(2)(C). *See Roadway Express Inc. v. Piper,* 447 U.S. 752, 763 (1980); *Wright v. United States,* 2 Cl. Ct. 409, 414 (1983), *aff'd,* 728 F. 2d 1459 (Fed. Cir. 1984), *cert. denied,* 469 U.S. 884 (1984). Such drastic sanction is not to be imposed, however, unless the failure to comply is "attributable to willfulness, bad faith, fault, or disregard of a party's responsibilities, * * *." *Wright v. United States,* 2 Cl. Ct. at 414. *See also National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 640 (1976). *Metadure Corp. v. United States,* 6 Cl. Ct. 61 (1984).

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The purpose of the discovery process is to secure the "just, speedy, and inexpensive determination of every action," RUSCC 1(a)(2), by narrowing and defining the issues to be litigated. That highly desirable goal has been wholly frustrated here. Instead, over the years this case has required both vast amounts of scarce judicial resources, and the obvious expenditure by the Government of considerable time, money, and effort. At least a substantial portion of the Court's and the Government's efforts herein can fairly be attributed to an unjustifiable failure to furnish direct and understandable responses to simple and straightforward questions concerning facts relevant to the claims asserted by plaintiffs in this case. This Court considers the responses given by the plaintiffs to be grossly inadequate and, in conjunction with its failure to complete discovery as ordered by this Court, to be a product of the plaintiffs' counsel's willful disregard for his responsibility to this Court.

There is no indication whatsoever that further indulgence, forbearance, or the extension of time or latitude would rectify or even improve the situation. Under the circumstances, it is at last time to conclude that there has been such a serious or total failure to respond to discovery as to make dismissal an eminently reasonable and justified sanction. *See Wright v. United States, supra,* 2 Cl. Ct. at 415.

II.

In addition to this Court's conclusion that plaintiffs' cases should be dismissed pursuant to Rule 37(b)(2)(C), it also holds that there has been a failure by the plaintiffs to prosecute their cases pursuant to Rule 41(b). RUSCC 41(b) provides in pertinent part:

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> For failure of the plaintiff to prosecute or to comply with these rules *or any order of court,* the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim. [Emphasis added.]

That plaintiffs have failed to prosecute their cases after nearly six long years of litigation is evidenced by the responses to the defendant's interrogatories already discussed in section I of this opinion, and their documents entitled "Analysis (17 Nov. 86)" and "Project (18 Nov. 86)" which were also included in their responses to the defendant's Third Set of Interrogatories. These documents, which outline plaintiffs' cases "are replete with 'will have to be ascertained' and 'we need to do'."

Specifically, plaintiffs' "Analysis (17 Nov. 86)" document states in pertinent part:

> *We will need to determine* the water elevations on the land and those periods of time which acreage was submerged or waterlogged as a result of river stages. * * *
>
> * * * *
>
> *We need to ascertain* the river drop per mile at various periods and for various flows. *We can then project with reasonable accuracy* what the wells would have read if they could have been reached during the high water periods. *We can then ascertain with reasonable probability* what the acres at various locations and elevations would have had in water involvement at various times.

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> *The acreage will have to be indexed to river mile.* At certain water elevations there may be higher land between an acreage and the river. There will be low areas in which at certain stages the water can find its way in from upstream or from downstream. *These will have to be ascertained with reasonable certainty.*
>
> * * * *
>
> According to Corps estimates, land lying below a 13 foot stage in the Bismarck area will be flooded more often than it was prior to flood control. *It is important to ascertain what* a 13 foot stage floods. *We would like to know* what each stage from 4 foot to 15 foot would flood.

Likewise the "Project (18 Nov. 86)" document states in pertinent part:

> *We need readings* at various flows and stages and for various years at Bismarck, USGS staff and Schmidt Gauges. *This will permit us to determine* probable water elevations on the subject property at their river mile locations.
>
> *We need readings* for each well that is relevant including those since the publication of the report. *This will permit us to determine* probable well readings for the periods they were not read, and give us probable water elevations on the subject property.

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> *We need actual readings* on the installed elevation posts as well as the contemporaneous stage and flow USGS readings on the Bismarck gauge and possible USGS staff gauge and Schmidt gauge.
>
> *We need to have a computer program* with this input so we can answer by printout the actual acreage as well as its size when we inquire of the computer what was flooded when. If we have to separate out that acreage that is below the ordinary high watermark we designate, *we should be able to* print out the discard as well as balance left innundated [sic], etc.

Project (18 Nov. 86).

Plaintiffs' own documents prove that they have barely begun to prepare their cases and have "without valid justification ignored both court-imposed deadlines and court rules." Plaintiffs were to have completed *all discovery* on December 9, 1986, so that defendant could complete its discovery and the cases could proceed to trial. It is clear that once again the plaintiffs have blithely ignored the Court's discovery schedule and substituted their own for this matter. This time, the Court will not ignore the violation of its orders. The plaintiffs have had almost six years to prepare and present their cases in a coherent and professional manner. Six years is well past long enough.

As the Federal Circuit decided in *Kadin Corp. v. United States,* 782 F.2d 175, 176-77 (Fed. Cir.), *cert. denied,* 106 S. Ct. 2895 (1986):

> Although dismissal is a harsh sanction, we cannot say that the Claims Court abused its discretion in dismissing the complaint here.
>
> As noted, the appellant repeatedly and without valid justification ignored both court-imposed deadlines and court rules. * * * The appellant's entire course of conduct reflected a callous disregard for the rules and regulations of the court and fell far short of the obligations an attorney owes to a court before which he is conducting litigation.

The Court believes the Federal Circuit's words are for application in the case at bar.

In addition, the Supreme Court determined in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30, *reh'g denied*, 371 U.S. 873 (1962) that:

> The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the [trial court's] calendars * * *. [Footnote omitted.]

In view of the above discussion, this Court finds that there has been a failure to prosecute presented in these cases that justifies the Court's dismissal of these actions with prejudice.

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CONCLUSION

For the reasons discussed above, defendant's motion to dismiss for plaintiffs' failure to comply with the Court's order compelling discovery and for failure to prosecute is granted. Accordingly, pursuant to Rule 41(b) and Rule 37(b)(2)(C), the present actions are to be dismissed with prejudice.

APPENDIX C — REQUEST FOR DETERMINATION DATED DECEMBER 20, 1986

IN THE UNITED STATES CLAIMS COURT

Request for Determination

Plaintiffs request the court to reconsider three areas of concern formally presented to the Court and which remain unresolved.

1. Plaintiffs had demanded production of the Corps of Engineers study of the land involved in these actions. The Corps had repeatedly assured early production of a study showing what private land had been flooded, eroded and affected by high groundwater. The study designated the cause of the injury and the future prognosis, particularly the extent and duration.

The Justice Department persuaded the Court that the study was at that time protected under the deliberative process and the Court so ruled. Even though annual demands continued to be made for this material under study at Congressional request, it was never produced. The Justice Department ordered the Corps to hold it in the deliberative process even after it had been totally completed and printed.

2. While the study was relevant to the land involved in these actions, it was also relevant to other land in which the principals of the Plaintiffs had an interest, several hundred thousand dollars worth of land and their home.

Since the Corps was being pressed by Congress to produce the report and directed by the Justice Department to conceal the report, the Corps were understandably nervous and confused. They didn't want to lie, but had been instructed not to tell the truth.

Appendix C

The Justice Department arrived at a solution and asked the court to order that any evidence the Plaintiffs counsel received from the Corps that was not channelled through the Justice Department attorney would not be allowed in evidence, and secondly that the attorney for Plaintiffs remove himself from the committee working with the Corps to save his personal land and property.

Plaintiffs encountered several difficulties in trying to get a ruling. The papers were returned unfiled or kept unread.

In any event, Plaintiffs request disposition of these items.

An example will illustrate the dilemma. The Defendant presented to the Court a request for a ruling that plaintiffs be foreclosed from using anything it received from the Corps unless it was received from Mr. Disheroon. Plaintiffs responded in writing. If plaintiffs had not responded, what would have happened?

The Plaintiffs papers were returned unfiled and thereby are not a part of the record. There was some explanation that they should be refiled when the Defendant's motion was made again or heard or something.

In any event, like any blackmail or extortion program it is the threat of dire consequences if you choose to disobey the threatener that is significant, and the need for a ruling is not moot until the threat is made again and again.

Perhaps the conduct is no longer relevant to the present proceedings. However, if the Justice Department is at liberty to pursue such conduct perhaps legislation is in order.

Appendix C

In February of 1987, the Senate Committee on Public Works will be holding hearings in Bismarck. The construction and operation of the Missouri River dam project has created problems which Congress desires to correct. Principally, the three problems are erosion, inundation and inequities. As Plaintiffs' Exhibits illustrate, the problem has existed a long time and been the subject of substantial Congressional concern. The record is replete with admissions by the Corps that it is flooding non-project land and will be flooding more in the future. The record shows the Corps was making a study so it could request authorization from Congress to purchase the property it required. The Corps pointed out that it would be unnecessary to commence litigation.

However the Corps was not proceeding at an acceptable speed so in 1981 claims were filed by the Plaintiffs in the Court of Claims.

Without question the claims prodded the Corps into producing their long promised study at a more rapid rate.

Unfortunately the Plaintiffs were out of the frying pan but into the fire. They had exchanged the nonfeasance of the Corps for the malfeasance of the Justice Department.

3. Another problem that should be of concern is the possibility that any litigant who sues the government must have available an enormous war chest. There may be a need for a plaintiff to fund coloring books to comply with the government lawyer's wishes. There may be a need to engage expert witnesses at very substantial cost to counteract the overpaid government witnesses, who, when they are not claiming the fifth, will apparently testify to anything.

Appendix C

So we all recognize that cases brought serve more than the determination of an award in a piece of litigation. If they did not, why would we print and publish the Court's decisions? As an obligation to other claimants who follow these plaintiffs paths, we need a ruling.

How much Justice Department concealment of evidence is judicially acceptable? What personal threats by the Justice Department against litigant's counsel are permitted? What economic resources are essential to successfully recover from the government for government theft?

Respectfully submitted,

William R. Mills
P.O. Box 518
Bismarck, ND 58501
701-223-4643

Dated this 20th day of December, 1986

APPENDIX D — RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article 3, Section 1:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensaton which shall not be diminished during their continuance in office.

United States Constitution, Amendment 5:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment 7:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.